

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-2065

To be argued by
JACOB LAUFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2065

GUS SCLAFANI,

Petitioner-Appellant,

—v.—

H. R. HOGAN, Warden, U. S. Penitentiary,
Atlanta, Georgia,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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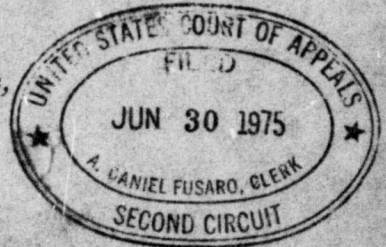
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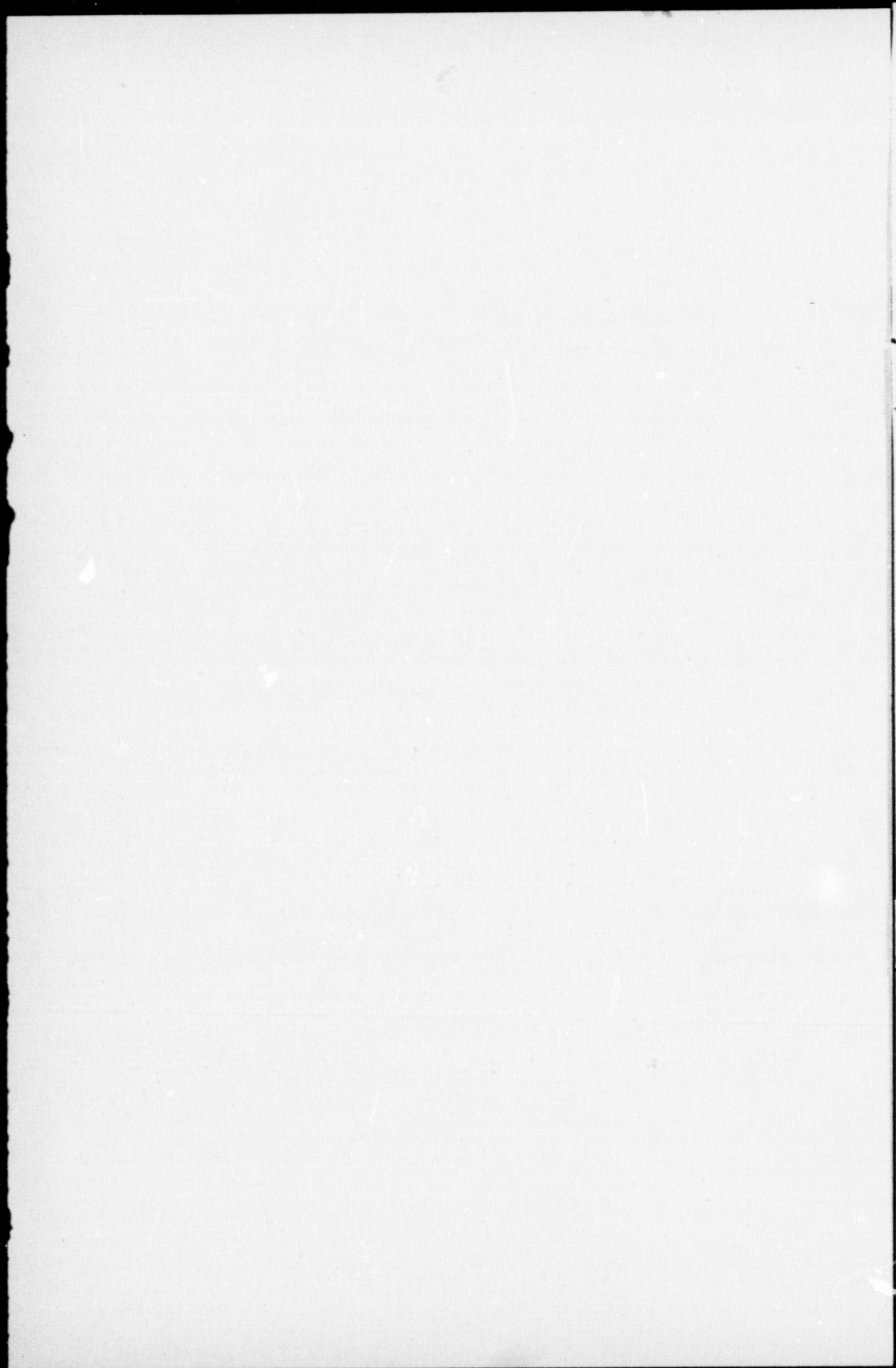


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H. R. HOGAN, Warden, U. S. Penitentiary,
Atlanta, Georgia,

Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Gus Sclafani appeals from an order with memorandum opinion filed April 4, 1975, in the United States District Court for the Southern District of New York, by the Honorable Edmund L. Palmieri, United States District Judge, denying, without a hearing, Sclafani's petition pursuant to Title 28, United States Code, Section 2255, to dismiss his indictment and to vacate his judgment of conviction and sentence.*

Indictment 71 Cr. 1243, filed on November 3, 1971, a 33-count indictment, charged Sclafani, and co-defendants Joseph Maida, Vincent Lore, Joseph Randazzo, Angelo Tuminaro, and Ben Ross, with having jointly used extortion-

* This memorandum opinion is found in Sclafani's appendix on this appeal.

ate means to collect extensions of credit, and with having conspired to do so, in violation of Title 18, United States Code, Section 894;* with having jointly engaged in the financing of extortionate extensions of credit, and with having conspired to do so, in violation of Title 18, United States Code, Sections 893 and 371. The indictment also charged Sclafani individually with three counts of income tax evasion, in violation of Title 26, United States Code, Section 7201; with one count of subscribing to a false income tax return, in violation of Title 26, United States Code, Section 7206(1); and with one count of filing a false income tax return, in violation of Title 18, United States Code, Section 1001.

After a 19 day trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury, Sclafani was, on October 11, 1972, found guilty of all charges with the exception of one count of income tax evasion and one count of subscribing to a false income tax return, which had been dismissed by Judge Palmieri at the close of the Government's case.**

On December 4, 1972, Sclafani was sentenced by Judge Palmieri to a total of ten years imprisonment and to committed fines totalling \$30,000.

Sclafani's conviction, as well as that of Ben Ross, was subsequently affirmed by this Court, *United States v. Sclafani*, 487 F.2d 245 (2d Cir. 1973), and certiorari was denied by the United States Supreme Court, 414 U.S. 1023 (1973).

On September 25, 1974, Sclafani filed a *pro se* petition under Title 28, United States Code, Section 2255, to vacate

* Ross was not charged with the substantive offense of having used extortionate means to collect extensions of credit.

** Ben Ross was convicted of all nine counts in which he was named. Joseph Maida, Vincent Lore and Joseph Randazzo had previously entered pleas of guilty. Angelo Tuminaro was then, and remains, a fugitive.

his conviction on the ground that a prior state conviction, allegedly considered by Judge Palmieri in imposing sentence had earlier been reversed. The petition was denied by Judge Palmieri in a memorandum opinion and order filed on October 24, 1974. *Sclafani v. United States*, 74 Civ. 4198 (S.D.N.Y. 1974). No appeal was taken.

On February 27, 1975, Sclafani, relying upon *United States v. Crispino*, No. 74 Cr. 932 (S.D.N.Y. Feb. 13, 1975) and *United States v. Williams*, No. 74 CR 47-W-1 (W.D. Mo. Nov. 15, 1974), filed his present petition under Section 2255, alleging that Special Attorney Aronwald of the Strike Force, who had presented Sclafani's case to the Grand Jury, had not been lawfully authorized to do so. The petition was denied by Judge Palmieri in a memorandum opinion and order filed on April 4, 1975.

ARGUMENT

The District Court properly denied Sclafani's petition.

On appeal, Sclafani contends that the District Court erred in rejecting his argument that Special Attorney Aronwald, as an Attorney with the Strike Force, was not properly authorized to appear before the grand jury which returned Sclafani's indictment. This contention is without merit.

This claim was waived by Sclafani's failure to raise it prior to trial. Fed.R.Crim. P. 12(b)(2); *Davis v. United States*, 411 U.S. 233, 242 (1973); 8 J. Moore, Federal Practice ¶ 12.01[2] (2d ed. 1969); *United States v. Tavoularis*, Dkt. No. 75-1027 (2d Cir., May 6, 1975) slip op. at 3460 n. 20; *United States v. Crispino*, No. 74 Cr. 932 (S.D.N.Y. March 24, 1975); *United States v. Williams*, No. 74 CR-47-W-1 (W.D. Mo. Nov. 15, 1974); see also *United States v.*

Papadakis, 510 F.2d 287, 300 (2d Cir. 1975), *cert. denied*, 43 U.S.L.W. 3584 (U.S. April 28, 1975); *United States v. Wilson*, 434 F.2d 494, 496 (D.C. Cir. 1970); *Sewell v. United States*, 406 F.2d 1289, 1292 (8th Cir. 1969); *United States v. Solomon*, 216 F. Supp. 835, 836-37 (S.D.N.Y. 1963) and the cases cited therein; cf. *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).^{*} Furthermore, it is foreclosed on its merits by this Court's decision, filed after Sclafani's brief was submitted, in *In re Grand Jury Subpoena of Alphonse Persico*, Dkt. No. 75-2030 (2d Cir., June 19, 1975).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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JOHN D. GORDAN, III,
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^{*} Sclafani is further precluded from raising his present argument by his failure to pursue it on direct appeal. *United States v. West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974); *Williams v. United States*, 334 F. Supp. 669 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972); *United States v. Gordon*, 433 F.2d 313 (2d Cir. 1970).

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